F. & D. Nos. 1175 and 1929.
I. S. Nos. 5271-b and 15959-b. Issued February 4, 1913.

United States Department of Agriculture,

OFFICE OF THE SECRETARY.

NOTICE OF JUDGMENT NO. 1881.

(Given pursuant to section 4 of the Food and Drugs Act.)

ADULTERATION AND MISBRANDING OF GUM TRAGACANTH AND ALLEGED ADULTERATION AND MISBRANDING OF ALEXANDRIA SENNA.

In May, 1910, the United States Attorney for the Southern District of New York, acting upon reports by the Secretary of Agriculture, filed in the Circuit Court of the United States for said district an information, and on September 23, 1911, another information in four counts, against J. L. Hopkins & Co., a corporation, New York, N. Y., charging shipment by said company, in violation of the Food and Drugs Act—

(1) On or about September 1, 1909, from the State of New York into the State of Virginia of a quantity of gun tragacanth which was adulterated and misbranded. The product was labeled "5 lbs., No. 1 Tragacanth Gum U. S. P. (astralgalus gummifer) powd. J. L. Hopkins & Co., New York."

Analysis of a sample of the product by the Bureau of Chemistry of this Department showed it to be the product known as Indian gum; no tragacanth gum (*Astragalus gummifer*) was present. Adulteration was alleged in the first count of the last information filed for the reason that the product was sold under and by a name recognized in the United States Pharmacopœia, to wit, gum tragacanth, and differed from the standard of strength, quality, and purity as determined by the test laid down therein at the time of shipment and investigation, in that it was not gum tragacanth and was not a gummy exudation from *Astragalus gummifer* Labillardiere or from other species of astragalus, but was a powdered Indian gum, and also in that it failed to conform to the tests laid down in said Pharmacopœia, among others the tests by sodium hydroxide and iodine and

alcohol, and the standard of strength, quality, or purity was not stated on the package except the false statement that the product conformed to the standard prescribed in the United States Pharmacopœia and its strength and quality fell below the professed standard and quality under which it was sold, in that it was sold as gum tragacanth of the standard of the United States Pharmacopœia, and was not such, but was of the character hereinbefore described. Misbranding was alleged in count 2 of the last information filed, for the reason that the product was labeled as set forth above, so as to deceive the purchaser or purchasers, in that the package and label of the article bore statements regarding it and the ingredients and substances contained therein which were false and misleading in that they stated that the article was gum tragacanth of the standard prescribed in the United States Pharmacopœia, whereas it was not gum tragacanth, but was Indian gum, and was not of the standard prescribed by the United States Pharmacopœia.

(2) On or about February 24, 1910, from the State of New York into the State of California of a quantity of senna leaves which were alleged to have been adulterated and misbranded. The product was labeled: "412 Alex. Senna Broken U. S. P., From J. L. Hopkins & Co., under the Food and Drugs Act June 30, 1906, Serial 3236."

Analysis of a sample of the product by the Bureau of Chemistry showed the following results: Ash, 19.20 per cent; ash acid insoluble, 9.15 per cent; the insoluble ash is chiefly sand of even-sized grains consisting of various minerals. Adulteration of this product was alleged in the third count of the last information filed, for the reason that it was sold under and by a name recognized in the United States Pharmacopœia, to wit, senna leaves, and differed from the standard of strength, quality, and purity as determined by the test laid down therein at the times of shipment and investigation, in that it contained stalks, stones, seeds, pebbles, and other substances foreign to senna leaves, and the standard of strength, quality, or purity was not stated upon the package excepting the false statement that the article was of the standard prescribed in the United States Pharmacopœia and certain substances, to wit, stalks, seeds, pebbles, and other foreign substances, had been substituted in part for the article, which were not declared, and its strength and purity fell below the professed standard and quality under which it was sold; that is to say, it was sold as Alexandria senna leaves, whereas it was not such, but was as above described. Misbranding was alleged in count 4 of the last information filed, for the reason that the product was labeled as set forth above, so as to mislead the purchaser or purchasers thereof, in that the package and label of the product bore statements regarding it and the ingredients and substances contained therein which were

false and misleading in that they bore statements to the effect that the article consisted entirely of senna leaves of the standard prescribed by the United States Pharmacopœia, whereas it did not, but consisted of a mixture of senna leaves, with stalks, seeds, pebbles, and other foreign substances.

On April 25, 1911, the case covering the shipment of the gum tragacanth having come on for trial, counsel for defendants moved to dismiss the information filed in May, 1910, on several grounds, the chief of which were that the information did not contain allegations showing that notice had been given to the defendant by the Department of Agriculture or that a hearing had been had, and the court sustained the motion and on September 23 the new information in four counts was filed covering the shipments of gum tragacanth and senna leaves. On October 2, 1911, defendants filed their plea and answer, and on February 13, 1912, the court (Hough, J.) rendered the following opinion striking out two of the pleas by defendant.

Having been called upon to plead, defendant offers a written document entitled "Plea and Answer", whereupon the prosecution moves to quash (i. e. strike out) as irrelevant or improper most of said written instrument.

An examination of the "Plea and Answer" shows it to consist of four parts:

1st. A declaration that defendant is not guilty;

2d. That prosecution is barred by the Statute of limitations;

3d. That defendant was formerly acquitted of the same misdemeanors as are charged in the present information;

4th. A statement which may be summarized as follows, viz: Long before the passage of the Pure Food Act, Gum Tragacanth was a well known article of commerce. It is a vegetable gum, exuding from many varieties of plants, which plants exist for the most part in Asia, but all such vegetable gums having the same properties were known as Tragacanth. The United States Pharmacopoeia (8th ed., Sept. 1909) is a publication which (for the purposes of the Pure Food Law) fixes the standard by which the quality of drugs shall be determined. The edition of the Pharmacopoeia above referred to declares in its Preface that "the standards of purity and strength (described in the book) are intended to apply to substances used solely for medicinal purposes and when professionally bought, sold and dispensed as such".

Said book contains a complete list of drugs, of which "a medicine dose" is prescribed, and neither Tragacanth nor Senna is on that list.

In May, 1909, defendant imported "33 bags Gum Indian Tragacanth". One of these bags was inspected by the Customs authorities and an Examiner of the Department of Agriculture, and passed as a "crude drug". Thereafter said Gum was ground by defendant, and after such grinding a skilled chemist made an analysis thereof and reported that said ground Tragacanth complied with the said Pharmacopoeia's requirements. Thereafter defendant received a pretended order from a firm in Norfolk, Virginia, asking among other things for five pounds Tragacanth Gum and ten pounds Senna leaves;—this order was really given by an employee of the Department of Agriculture. Defendant sent, *inter alia*, both the Tragacanth Gum and Senna leaves, filling the order for Tragacanth with its second quality described as "Tragacanth Gum No. 1 U. S. P. Powder". That at or just before the time of this sale certain

employees of the Department of Agriculture had publicly claimed in writing that Gum Tragacanth from India was not real Tragacanth, but of this fact no public notice had been given, nor was defendant aware of it at the time of shipment.

Defendant had long sold and catalogued several varieties of Senna, described as "Whole leaf U. S. P.", "Half leaf", and "Broken". Defendant received an order from a firm of San Francisco, California, for one barrel of Senna "U. S. P. Broken Powder",—and for two bales "Senna Alex. U. S. P. Broken". Defendant filled this order partially, by shipping two bales of Senna, Broken, which had been passed by the Customs and Agricultural authorities of the United States. Said order so received from California was not a genuine order, but one given at the instigation of the United States Department of Agriculture. Senna in the leaf is not used for medical purposes, but by soaking and filtration is made into extract, so that the broken leaf is as effective as the whole leaf.

The information consists of four counts:

(1) Shipping in interstate commerce adulterated Gum Tragacanth, in that it differs from the standard of strength, quality and purity laid down in the United States Pharmacopoeia;

(2) Shipping in interstate commerce misbranded Gum Tragacanth, in that the article was labeled with the false and misleading statement that it was Tragacanth of the standard prescribed by said Pharmacopoeia, whereas it was not Gum Tragacanth, but Indian Gum, and not of the standard prescribed as aforesaid;

(3) Shipping in interstate commerce adulterated Senna, not of the strength, quality and purity prescribed by the United States Pharmacopoeia, in that it contained stalks, stones, seeds, pebbles and other substances foreign to Senna leaves;

(4) Shipping in interstate commerce misbranded Senna, in that its label represented the article to consist entirely of Senna leaves of the standard prescribed by said Pharmacopoeia, whereas it in fact consisted of a mixture of said leaves with stalks, seeds, etc., etc.

Mr. Hitchings for the defendant;

Mr. Whitney, Assistant U. S. Attorney, opposed.

MEMORANDUM.

It is suggested that so extraordinary are the prosecutions or proceedings brought under the Pure Food Law, that some new procedure should be brought out in respect to them,—apparently for the purpose of preventing a trial occurring on the Criminal side of the Court until after the facts have been looked into by the Court itself.

This is a startling innovation, and so far as I am concerned might be disposed of by expressing my unwillingness to attempt such new procedure, and my belief that juries are far more apt to be extremely tender of defendants and their rights, real or pretended, than any Judge could be.

But it is perhaps advisable to indicate, even at some length, the view that no such method of judging facts is permitted by the Criminal Law.

It is the invariable practice in this District to prosecute under the Pure Food Law by criminal information,—that is, the Government alleges a misdemeanor.

It is not open to doubt that Congress has created several possible misdemeanors by the passage of the act in question. Procedure by criminal informa-

tion is common law practice, and being a matter of practice it needs no statute to support it. Originally it was a concurrent remedy with indictments for all misdemeanors except misprision of treason. In practice, even before the Independence of the United States, leave to file information was seldom sought by the Attorney General except at the instance of a high officer of Government.

Informations under the Pure Food Law are perfect representatives of this ancient practice being brought by the District Attorney under leave of Court at the instance of the Department of Agriculture.

In the United States the function of an information is limited, however, by the constitutional provision that no one shall be held to answer for a "capital or otherwise infamous crime," except on presentment by the Grand Jury. (On this subject generally See 2 Hawk, P. C., Cap. 26, Sec. 3,—page 326 et seq.; *United States vs. Waller*, 1 Sawyer, 701; *Ex parte Wilson*, 114 U. S., at 425; *United States vs. De Walt*, 128 U. S., 393.)

An information, therefore, being no novelty, it does not become one by being applied to a new misdemeanor. The course of trial is and must remain that of an indictment. It is therefore necessary to inquire what pleas are possible either to an indictment or information, there being no such thing known as an answer in Criminal law in the sense in which that word is used on the Civil side. All possible pleas on the Criminal side of this Court must be either in abatement, in bar, or the general issue.

A motion to quash is not a pleading and therefore is not included, and jurisdictional pleas, which are sometimes given as a separate class, are really either in abatement or bar according to whether the objection is to a particular court or to courts in general. Tested by these rules this defendant has

1st. Pleaded the general issue, which is of course proper and sufficient;

2nd. The statute of limitations is raised by special plea, which is permissible but not necessary; *United States vs. Brown*, 2 Lowell, 267;

3d. A plea is tendered of *autre fois acquit*, concerning which plea the record is in the same condition as found by me in *United States vs. Robinson*, Mem. filed Jan. 18, 1910; and finally,

4th. The evidential matter as above digested is put into a pleading.

It may first be noted that the plea of *autre fois acquit* or *convict* should not be tendered simultaneously with the general issue. It is the rule in Criminal law as it was at Common Law on the Civil side, that defences both dilatory and peremptory if they did not go to the merits of the controversy should be pleaded first, in order that judgment (if against defendant) might be *respondeat ouster*. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (*Rex vs Taylor*, 3 B & C, 502) had been modified,

This, however, being a matter of detail only, I have examined the record as if the prosecution had filed a replication to the plea of *autre fois acquit* and find by the record that the previous information failed for what the Court considered defects apparent on the face thereof. Therefore it was no information, and the defendant was never in jeopardy.

Notwithstanding the informality of the fourth plea, what is sought to be raised is I think plain enough, unless this defendant shipped a "drug" it is not guilty under this information. "Drug" is defined by the sixth section of the Act, and the standard of drugs is to be ascertained from the United States Pharmacopoeia by the seventh section thereof. What the Pharmacopoeia says, therefore, the defendant asserts the Court may take judicial cognizance of, and having done this it is found that neither leaf Senna nor Gum Tragacanth is a drug in the sense in which the Pharmacopoeia uses that word, i. e. "Substance

used solely for medicinal purposes and when professionally bought, sold and dispensed as such".

If such a plea as this (plainly in bar if it is anything) can be tried, it must be tried either by the Court or the jury; and no matter which course of trial is adopted, it is a sure test of a good plea that the trying power can give judgment or verdict either way.

If it be regarded as a plea triable by the Court only, judgment against the defendant would be *respondeat ouster*, but such judgment would be based necessarily upon the insufficiency of the facts alleged, admitting them to be true. This reduces the whole matter to an absurdity, for if the facts alleged (as I understand them) be true, the defendant is not guilty and the Court has no more power to pronounce a judgment of Not Guilty than it has to enter one of Guilty.

I think this analysis shows that the alleged plea amounts to no more than a statement of evidence intended to support the plea of Not Guilty; therefore it is not a plea at all.

IT IS ORDERED: That the pleas of Not Guilty and Statute of Limitations stand; that the plea of *autre fois acquit* be overruled after an inspection of the records of this Court, and that the remainder and balance of the document filed and entitled "Plea and Answer" be stricken from the files as unauthorized by law.

On May 30, 1912, the case came on for trial before the court and jury. The trial was upon the third and fourth counts of the information. The first and second counts charging shipment of adulterated and misbranded gum tragacanth were nolled on the grounds that the shipment of that article was not made from the Southern District of New York but from the Eastern District of New York, and on June 27, 1912, an information was filed by the United States Attorney for the Eastern District of New York, covering said shipment, in the District Court of the United States for said district, where this case is now pending. At the end of the Government's case, upon the trial of the third and fourth counts of the information charging shipment of adulterated and misbranded senna leaves Alexandria, counsel for defendant moved to dismiss the information. The motion was granted as to the third count covering the charge of adulteration of senna leaves, as more fully appears in the following opinion:

The COURT (Hand, J.): This is a case under the title of June 30th, 1906, an information charging the defendant with shipping in Interstate Commerce a bale of senna labeled "412, Alex. Senna, Broken, U. S. P." The prosecution has proved the shipment of the bale and also its contents.

Now, it appears that in the shipment of Senna to the United States there are several grades, first beginning with what is known as whole leaf senna, the second the three-quarter leaf, third the one-half leaf, fourth broken leaf, fifth senna siftings, and sixth, senna dust. All of these products are prepared by a process of sifting from the gross products; it is pulled from the senna plant by Arabian natives of the African desert.

There is evidence in the case sufficient to go to the jury that the product in question was not broken senna, but senna siftings. On that question of fact it would not be my province to determine if the case were to go to the jury,

but the law requires me to assume upon this motion that the product was senna siftings, and that, therefore, it did not comply with the label which described it as broken senna. That, however, is not sufficient to make a case with the Food and Drugs Act.

Both sides concede that the only provision applicable to the case is the first subdivision of Section 7 of that Act, which reads as follows:

"If when a product is sold under or by a name recognized in the United States Pharmacopoeia or the National Formulary, it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopoeia or National Formulary official at the time of the investigation."

If the defendant has violated the act it is in that it has shipped something which differs from the standard of strength or purity from that laid down in the United States Pharmacopoeia.

Now, I think that the shipment in this case was sold under a name recognized in the U. S. Pharmacopoeia because when that Pharmacopoeia used the word senna it certainly included more than the whole leaf, three-quarter leaf, or one-half leaf, but also included broken senna; nor could the defendant in this case escape consequences of a violation of the Act by describing senna as broken senna, especially as he uses the word U. S. P. But the statute only forbids the shipment of the article which differs in the standard of its strength or purity from what is laid down in the United States Pharmacopoeia.

Turning to page 392 of that publication I find that there is no standard laid down except that senna consists of the dried leaflet of the plant and that it should be free from stalks. The only relevant clause in the Pharmacopoeia is the phrase which I have just stated—senna should be free of stalks.

Now, the Government contends that the word stalks includes not only the stalk proper of the plant, but the stem on which the leaflets grow which is commonly known as the rachis, and for the purposes of this prosecution I will admit that the position of the Government is correct in that respect and that the term stalk includes the rachis. Very well, that being the fact, was there any senna ever brought into the United States which was free from stalks? The proof shows contradiction. Therefore, in considering this clause of the Pharmacopoeia it is quite clear that you cannot construe it literally or absolutely; indeed, the Government with some hesitation, I may say at least, makes no very strong argument to the contrary, and I must say that any such argument it seems to me, is hardly worthy of serious consideration because the Pharmacopoeia is a book put in the hands of druggists all over the country, men of no great learning, for practical use, and this surely must be intended to bear upon the commercial usages of the country and to have some reference to the raw materials which the chemists actually use, else it is a merely delusive, arbitrary and scholastic publication which it certainly is not. Therefore, you cannot consider the word as meaning it should be wholly free from stalks. What then is the standard of strength of purity which the Pharmacopoeia establishes? The Senna which passes commercially by the name of broken senna contains less of the stalks than that which passes under the name of senna siftings. If the Pharmacopoeia had described both broken senna and senna siftings, I think I might say that that was the standard; that is, by those terms it would have reference to the commercial usage of the terms, and that if a person sold broken senna siftings for broken senna he would be not conforming to the standard prescribed by the Pharmacopoeia. The question, therefore, simply resolves itself into this: am I free to interpret this pharmacopoeia as meaning—

to accept the meaning of the Pharmacopoeia to be that when you sell broken senna it should be free from the amount of stalk common to such senna as passes by that name in the market, and when you sell senna siftings, it must be free from more stalks than is present in that senna which passes as senna siftings. Now, I don't think in a criminal statute that I am free to expand that question in the way it is suggested. The Pharmacopoeia could have made the standard of that commercial usage. I don't think it has; I don't think that any one reading it could fairly be charged criminally with failure to recognize that the phrase related to commercial usage in the different grades as they are accustomed to. On that account it does not seem to me that I can say, or let the Jury say, in this case, that they have been different from the standard of purity which the Pharmacopoeia has established. That being true, gentlemen, I take the case from you, and direct a verdict for the defendant.

A motion by defendant to dismiss as to the fourth count, covering the charge of misbranding, was denied, whereupon the defendant introduced evidence, and thereafter the court charged the jury and the jury on May 31, 1912, returned a verdict of not guilty on the fourth count. The charge to the jury (Hand, J.) follows:

Gentlemen of the Jury, in this case, as you perhaps already understood, there were two separate charges against this corporation; the first was for the adulteration of its drugs and the second is for their misbranding. The first charge I have withdrawn from your consideration and so you need not regard it when you come to deliberate. The only thing that remains for you is the charge that they misbranded their goods.

Now, the Congress of the United States in the exercise of its power to regulate interstate commerce has provided—has prescribed—certain things which you shall not do, among others that you shall not misbrand drugs that pass from one state to another. The actual words are, no person—I do not mean literally, but the actual significance of the words is, no person shall deliver for shipment from any state to another state any misbranded products. Then afterwards in the statute having made that prohibition, in order to enlighten us as to what the term misbranded means, it says that misbranded products are those whose package or label bears any statement regarding the article contained therein which shall be false or misleading in any particular, and that is all that the statute says. In this case, therefore, you will have to determine that the corporation delivered for shipment from one state to another state certain drugs; second, that those drugs were misbranded, and in determining whether they were misbranded you will have to consider whether the package or label bore any statement which was false or misleading.

As to the first it is not disputed the defendant concedes that they sent this bale of senna in a package of burlap and matting from the State of New York to the State of California; they do say that the Government has not proved that the drugs were misbranded. How are you to determine that question? In the first place, did the package bear the statement about the senna? That is not in dispute. The package was labeled, as you will remember "412, Alex."—meaning Alexandria—"Senna, broken, U. S. P." and then said where it came from, so that this package did bear a label or a statement about the contents. Now, then, there remains the question, was that statement false or misleading in any particular? That is the issue in the case, and the issue about which all of this testimony has been taken, or at least, a large part of it—some of it was taken before I withdrew the question of adulteration.

Now, gentlemen, the question of whether the statement on the label was false in any particular is to be determined by whether the meaning which it conveyed to the ordinary man when he read it was not a truthful statement of what the facts were. The fact was that this had come over under the name of senna siftings, and that it was one of the grades of the article which contained, I think, 20% of stalk and rachis, together with a certain number of pebbles, and so on; you have heard the testimony and you remember what the actual character of the article was. There is no dispute about what the character was; there is no dispute but that it was legal to import it into the United States and that it was an article which could pass in commerce; there is nothing illegal or contraband about it. Now, then, did the label which the defendant used correctly state those facts, and again, in the determination of that, did the label, or, rather, in amplification of that, did the label state to an ordinary man that it was senna of that kind? In determining that question you may consider the fact that it was going to people who were familiar with the trade, that the label was intended to be read and to be understood by men who were in the drug business, and so you must consider whether within commercial meaning, as you have heard the testimony in regard to it, that the character of senna siftings was known in the trade as broken senna. If it was not, if broken senna meant something which had never been senna siftings, then the defendant was guilty of misbranding the goods. The question is of the meaning,—the trade meaning, of that label or package, whether it corresponds with that character of senna siftings. Now, the testimony upon that question I don't think I need go into at any great length. The Government testimony is that of Moore and Rusby. Mr. Moore said that senna means in the trade the whole leaflet and the three-quarter senna means the whole leaflet somewhat broken, so one-half senna, and that broken senna means pieces of the broken leaf of one-sixteenth to one-quarter or one-half; that is, less than the half senna, but not with the added percentage of stalks and stems. Mr. Rusby says that he was for a long time I think the pharmacognasist, in any case employed to scrutinize the products which were purchased by a large drug house of this country, Parke, Davis & Company; that he had a large experience with the character of the different kinds of senna and the names applied to them, and he says that the classification was whole senna, three-quarters, one-half, broken, siftings, and dust, and that this came in the next to the last classification, sifting, and was not broken. The testimony of the defendant on the other hand, is that he coined, so far as he knows, he coined the word "broken," and that he applied it to a kind of sifting, the first of the three classes of siftings, and that he used it, and the inference may be made, you may make the inference if you see fit, that it had been the general knowledge in the trade, and so did not indicate any particular grade of the siftings. There you have the conflicting testimony, and in that conflict it is your province absolutely to determine. I will leave the facts to you as they are. I may say that the intention of the defendant in the case to mislead is not a material element, and you need not find it. In this particular case you may well come to the conclusion if you determine that there was a misstatement that the defendant knew he was making a misstatement, but it is of no consequence and it is not necessary that you should reach that conclusion that it is relevant. It is enough that the package bore the statement which was misleading in form in the sense which I have tried to determine. Nor is it of any consequence whether the consignee of the goods was in fact actually misled. The parties have introduced the testimony in both ways; upon that the Government says there is testimony that Mr. Herb was mislead because he expected his elixir to be more potent, and he got less

potency from it because of the impurities. The defendant says, on the other hand, the consignee must have gotten what he wanted, or he would have returned it. But that whole question, whether in this specific instance the consignee was misled is immaterial and of no consequence. The question is whether the package bore a statement which to the ordinary man in the trade would have meant something different from what it actually contained. If you determine that you will bring in a verdict of guilty.

Now, so far as the degree of proof is concerned, you have already sat in a number of criminal cases and you know that all the facts in the case must be proved beyond a reasonable doubt in favor of the Government, and then you can bring in such a verdict. This is just like any other criminal case in that respect. Each statement of the case must be established against the defendant beyond a reasonable doubt, and I think I have told you that the best definition which I can give you of that degree of conviction is that it would be such a degree of assurance as would make you willing to entrust affairs of great consequence as you may have upon your conclusion. If you come to such a conclusion in this case then you may bring in a verdict for the Government. If you find that you can not reach such a degree of conviction you must bring a verdict in of acquittal.

Mr. HITCHINGS. I beg to except to that portion of your Honor's charge in which you say if senna was not known to the trade as broken senna, and I ask your Honor to charge the Jury that in this case if Scott & Gilbert knew the meaning of the word broken as you are advised, that then the prosecution must fail and the defendant be found not guilty. I except to your Honor's charge that the intention of the defendant in putting this label on the package was immaterial. I except to that portion of Your Honor's charge that it is of no consequence that the consignee was not misled, and I except to that portion of Your Honor's charge that if the label would deceive an ordinary man that then the defendant was guilty of misbranding, and again I request Your Honor to state that the label must have deceived the consignee—must have been calculated to deceive the consignee or there cannot be a verdict for the plaintiff.

THE COURT. Well, calculated to deceive the consignee; that is rather different. I will charge you, gentlemen, that the label must have been of such a character as would be calculated to deceive the consignee. That it should actually have deceived him? No.

Mr. HITCHINGS. I want Your Honor to charge this Jury specifically that any ordinary man outside of the consignee has nothing whatever to do with it and the Jury has nothing whatever to do with it.

THE COURT. No, I won't charge that.

Mr. HITCHINGS. I take an exception. Will Your Honor call the attention of the Jury, in as much as you have adverted in your charge to it, to the fact that he did not know anything about senna siftings, Mr. Moore, and also the fact that Ross testified that senna broken and senna siftings were the same thing?

THE COURT. I have stated that.

A JUROR. Will you inform the Jury what qualities of senna that word U. S. P. can be put after?

THE COURT. I will charge you, gentlemen, that it could be put after the actual contents of this bale. You need not be concerned with the U. S. P. There was no misbranding in that they put U. S. P. upon the contents of this bale.

Mr. HITCHINGS. I ask your Honor to charge the Jury as to that, that Scott & Gilbert were not misled is some evidence that the Jury may consider that the label was not misleading.

THE COURT. Yes, I will charge that, Gentlemen, I really intended to do it in my charge: In considering the question as to whether the meaning in the trade—to the man in the trade—that the meaning of broken senna indicated the contents of this package, you may, I think, fairly consider the fact that Scott & Gilbert received it and whatever the testimony is in his deposition. You may take the deposition if you like. I won't charge you now, because I have forgotten what he said about that; it was read and counsel differed in their recollection, and I haven't any definite recollection of what he said, but if he said he regarded it as broken senna, that would be a piece of evidence you could consider.

W. M. HAYS,
Acting Secretary of Agriculture.

WASHINGTON, D. C., *September 26, 1912.*

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